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Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Feb. 26, 1901.

No. 550.

JOHN L. SHUMATE ET AL., PLAINTIFFS IN ERROR,

vs.

AUGUST HEMAN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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(18,035.)

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STATEMENT OF FACTS.

Suit was instituted herein by August Heman for the enforcement of a special-tax bill issued by the city of St. Louis for the construction of a sewer in what is called Euclid Avenue sewer district number 1, the same amounting to ninety-eight dollars and seven cents. The trial did not occur until many years after the tax bill was issued, and then resulted in a judgment in favor of Mr. Heman. The defendants thereupon appealed to the supreme court of Missouri, where

the judgment of the trial court was affirmed, the case being reported as Heman *v.* Allen, 156 Mo., 534, and after such affirmance the defendants brought the proceeding to this court by writ of error.

The principal provisions of the charter of the city of St. Louis bearing upon the matter involved are sections 21, 22, and 25 of article VI. These will be found on pages 2512, 2513, and 2514 of the second volume of the Revised Statutes of Missouri of 1899, and we attach a copy of them as an appendix to this brief.

Under these provisions sewers in the city of St. Louis may be either public sewers, district sewers, or private sewers; and for the purposes of this proceeding we are only concerned with the district sewer. Under the charter a sewer district is first established and its limits prescribed by the municipal assembly, and then, whenever the majority of the property-owners resident in the district shall petition therefor, or whenever the municipal board of public improvements shall recommend it as necessary for sanitary or other purposes, a district sewer is constructed in the district.

Every such district sewer drains only its own district, and the provision with regard to the assessment of its cost is as follows:

"As soon as a district sewer, with its inlets, manholes, and other appurtenances, is fully completed, the said board shall cause to be computed the whole cost thereof, and shall assess it as a special tax against all the lots of ground in this district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway."

Every district sewer must be constructed so as to connect with either a natural course of drainage or with a public sewer, and from this requirement it necessarily follows that one district sewer may not empty into another, and that each district sewer must in its use necessarily be limited to the drainage of its own district. It is on account of this that the occasion arises for public sewers.

"The city has no right to burden one sewer district with the expense of constructing a sewer larger, and necessarily more costly, than necessary to drain the district in which it is constructed" (Eyerman *v.* Blaksley, 79 Mo., 152).

The purpose of the entire system of the sewers of the city is the drainage of sewage into the Mississippi river, but it is evident that many district sewers, and probably most of them, can have no direct connection with that river; and inasmuch as the conveyance of the sewage by means of water-courses must necessarily be limited, it follows that most of the sewage must be conveyed from district sewers to the river by some other sewer. The sewer which subserves this purpose is called a public sewer, and its cost must be wholly paid out of the public revenue of the city. The city must also, under the provisions of section 22 of article VI of its charter, pay out of its general revenue "the repairs and other incidental expenses of district sewers."

It follows that private property does not, under the charter, defray the entire expense of the construction of sewers for its own drainage, and that it does not pay any part of the cost of the maintenance of the sewers after their construction. It is assessed only for its proportionate share of the cost of the district sewer in its own district, and the cost of the

public sewer which conveys the sewage from the mouth of the district sewer to the Mississippi river, as well as the entire cost of the maintenance of all district sewers and all public sewers, is paid by the city at large. Moreover, inasmuch as the share of each lot is fixed in accordance with the ratio which its area bears to the area of the entire district, it follows, as we think, that each lot pays precisely for its own drainage, so far as the same is effected by the district sewer, and for nothing else.

ARGUMENT.

I.

We take it that the sole question which is to be considered by this court in the present cause is that of the constitutionality of the assessment involved. The reliance of the plaintiffs in error in combatting the validity of this assessment is, and of necessity must be, based exclusively upon the decision of this court in—

Norwood *v.* Baker, 172 U. S., 269.

The question of the effect of that decision is also brought before this court by a number of other causes, differing, however, from the one in which we are engaged in that the assessment in litigation in each of them is for the paving of a street.

The case of *Norwood v. Baker* is also of that character, and therefore an inquiry arises in the present cause which is not involved in the others, namely, whether, even if the Norwood case goes to the extent claimed for it by the plaintiffs in error and their associates, the ruling is applicable to the present assessment for a sewer.

The point in issue as to the effect of the Norwood case is whether it is consistent with the power of the legislature of a State to assess the cost of a street improvement upon abutting property, and to apportion that tax among the different lots according to their respective frontage, without right on the part of the property-owner to deny the existence of special benefits to the extent of the assessment, or

whether it secures to a land-owner in every case the right at some stage of the proceeding to contest the amount of the special benefit to his property. That question we will naturally consider hereinafter; but we mean to maintain that, even if the latter view, which is that contended for by the plaintiffs in error, were the correct one, it would not invalidate the assessment for sewers in our case.

The assessment in the Norwood case was held by this court to have been a species of taxation, and its legality was considered only from that standpoint. The assessment involved in this case may be sustained on the same theory; but it may also be predicated upon the *police powers* of the State, and in consequence be upheld even when powers of taxation would fail.

That a distinction of this character exists is recognized by a considerable number of very high authorities *and, is, so far as we know, disputed by none.*

Thus it has been held in Pennsylvania (*Pittsburgh Orphan Asylum's Appeal*, 111 Pa. St., 135) that property fronting upon a street could not be taxed for the reconstruction of the street after it had been assessed with the cost of the original paving; but the court, in so holding, draws a distinction between an assessment for street paving on the one hand and one for sewers on the other, and also between an assessment for street paving and one for sidewalks, saying:

"We can readily understand why the cost of constructing and maintaining a sewer, which is designed for the drainage of a particular street or locality, and which is essentially necessary for the health, comfort, and convenience of the inhabitants dwelling along such street or in such locality, should be assessed upon the property of the district thus

benefited, for the improvement as well as the use is local, and the benefit to the public is but secondary. So with a sidewalk, without which a house in a town or city cannot be said to be finished. But when we come to a street or other highway, which is primarily designed not for the welfare or use of the inhabitants of any particular locality, but for the public at large, the case is very different."

To like effect is *Smith v. Kingston Borough*, 120 Pa. St., 363, 364.

In *Palmer v. Way*, 6 Colo., 106,* it was held that the constitutional requirement for uniformity of taxation operated as a limitation upon local assessments for street improvement, but that an assessment for the paving of a sidewalk could be maintained as an exercise of the police power, and that the owners of lots abutting on streets could therefore be required to construct sidewalks in front of their respective lots at their own expense.

Subsequently the legality of an assessment of the cost of sewers against property in the sewer district, which was made according to area and not based upon value, benefits, or improvements, was likewise held to be valid in *Keese v. City of Denver*, 10 Colo., 112. The same holding was again made in *City of Pueblo v. Robinson*, 12 Colo., 593, where the court said:

"It has been held that the word 'taxes,' as used in the section last referred to, does not include special assessments against property specially benefited by the local improve-

* This case was overruled as to its holding that this constitutional provision was applicable to local assessments (Denver City *v.* Knowles, 17 Colo., 204), but this fact does not detract from the distinctions made while it was in force.

ments; but the decisions of this court are to the effect that such assessments cannot be upheld under the uniformity rule of taxation, unless the improvements are clearly within the domain of police regulations. * * * Sewer assessments are within this police power."

Judge Cooley in his work on taxation (second edition, p. 590) also recognizes the constitutionality and propriety of sewer assessments on the same ground. He says:

"There seems to be no legal impediment to a requirement under the police power that lot-owners in cities and villages shall be at the expense of constructing that part of the public sewer in front of their respective premises. It is true that the levies for the purpose of constructing sewers and of keeping them in repair are commonly spoken of as taxes; but, as has been justly remarked, there is just as much reason to subject the owners of land abutting to contribution of their expenditure, as there is to oblige them to pave the footways in front of their grounds, or to keep the same in repair when the city shall pave the streets adjoining. It should be a charge on the land just as is the requisition on the owners of land abutting on the streets to clear away the snow at their own expense, which has been determined to be a reasonable provision."

It will be noticed that the author assimilates an assessment for the construction of sewers to one for the construction of sidewalks, and this similarity is generally recognized by the various decisions on the subject. At the same time it seems to us that the burden of defraying the cost of sewers may be imposed as an exercise of the police powers even more clearly than a charge for the construction of sidewalks. Between the assessment for street paving and the assessment of sidewalks there is much greater similarity in purpose,

and also much greater similarity in the extent of the benefit enjoyed by the public, than in the construction of sewers for the sole purpose of draining the property assessed therefor. The sidewalk is really a part of the street, and, though more closely connected with the use of adjacent premises than the street proper, the difference in its relation to the property is more one of degree than kind.

In the case of sewers the distinction is clearly one of kind, and the right of assessment as a police regulation seems to us beyond reasonable controversy. In point of utility to the premises taxed the sewer is also more of an improvement for the special benefit of that property than a sidewalk, and is of usefulness for public purposes only in the general sense that all police regulations, and for that matter all legislation, are made in furtherance of the public welfare.

The following authorities, which maintain that restrictions upon the legislative or municipal power of assessment for street improvements proper do not apply to the assessments for the construction of sidewalks, therefore, support our claim of a clear distinction in favor of assessments for sewers, and this, whether the distinction in the case of sidewalks be strictly attributable to the police powers of the State or rests on other considerations:

James *v.* Pine Bluff, 49 Ark., p. 202 *et seq.*
Wilson *v.* Philippi, 39 W. Va., pp. 82, 83.
State *v.* Newark, 37 N. J. L., p. 423.
Macon *v.* Patty, 57 Miss., 406.
Sands *v.* Richmond, 31 Gratt., 571.

It was held in Arkansas that a constitutional provision, requiring all taxes to be uniform and all property to be assessed in accordance with its true value in money, applied to assessments for street improvements, and that such assessments would therefore be invalid if made according to frontage (Peay *v.* Little Rock, 32 Ark., 31); yet it was held, in *James v. Pine Bluff, supra*, that a statute conferring on cities the power to require lot-owners to build and maintain suitable sidewalks along their premises was not in contravention of the constitution, it being a delegation of the police power of the State. This case practically follows the course of decision adopted in Colorado in the cases hereinbefore cited in support of sewer assessments.

An ordinance similar to that involved in James *v.* Pine Bluff came before the supreme court of Mississippi in *Macon v. Patty, supra*. Without going into the full course of argument adopted by the court, we quote the following, which expresses its conclusion:

"We conclude, therefore, that it is now established that these local assessments are not within the unrestricted discretion of the legislature; that they are subject to many and just limitations which the court will enforce; and that among them is, that the assessment cannot be imposed upon an individual alone, but must be apportioned among a subdistrict of several. *If this were a local assessment it would be void for the reason stated.* The improvement, however, is the repair of a sidewalk, not a street, and it seems to be well settled that the paving and repairing of a sidewalk in front of the owner's property may be imposed upon him as a police duty."

The case of State *v.* Newark, *supra*, is one of two cases in which, so far as our research has gone, the power of the

legislature to determine the amount of local assessments and to apportion it according to some general reasonable rule is denied on general principles—that is, without reference to special constitutional requirements in relation to taxation. The *syllabi* of that case are as follows:

"1. The statute authorizing the expense of paving the road-bed of a city street, to be assessed in proportion of two-thirds on the property abutting on the street and the remaining one-third on the public at large, is unconstitutional.

"2. Assessments for local improvements of this character may be made against the property peculiarly benefited, but such assessments must be made to the extent only of such peculiar benefits."

Yet, though such was the ruling of the court in respect to street improvements, and it will be observed that it is precisely the ruling for which the plaintiffs in error contend in the present case, the court expressly distinguished assessments for sidewalks, using the following language:

"I think the difference is a substantial one. A sidewalk has always, in the laws and usages of this State, been regarded as an appendage to, and a part of, the premises to which it is attached, and is so essential to the beneficial use of such premises, that its improvement may well be regarded as a burden belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable."

The other cases above cited recognize that the distinction in favor of sidewalk assessments has been based upon the

intervention of the police powers of the State, but proceed also upon the idea that the utility of sidewalks to premises is greater than that of streets proper, and that the assessment therefor according to frontage is generally more uniform and reasonable, and this leads us to point out that, even if the assessment involved in the case at bar be considered from that standpoint, its validity can be maintained.

From what we have mentioned in our statement of facts it appears that the sewer in this case was built exclusively for the benefit of the property which was assessed for it. It drained all the property in a certain district, whose limits were prescribed, and nothing else, and its cost was assessed against all that property and apportioned in accordance with the precise benefit derived by the lots from it, viz., in proportion to their respective areas.

In the case of streets, and even of sidewalks, it may be said that the public enjoys the use of the improvement, and therefrom it may be argued that the municipality should defray out of its own funds a portion of the cost of the improvement. This, however, cannot be said in the case of a sewer built under laws like those giving rise to the assessment in this case. The public made no use of the sewer for which that assessment was made, and enjoyed no benefit therefrom. It is true there may have been openings in the sewers from the streets which carried off surface waters, though we do not recall that this appeared in evidence. Yet, even if this limited drainage existed, it was for the benefit of the abutting property, and it was within the power of the legislature to assess that property without deduction therefor, just as the legislature may impose a tax for the sprinkling of streets on abutting property or require

owners to remove snow and ice from adjacent highways. *Reinker v. Fuehring*, 130 Ind., 382; *Goddard v. Petitioner*, 16 Pick., 504; *Village of Carthage v. Frederick*, 122 N. Y., 268. Indeed, the drainage of the streets was plainly for the use and benefit of the premises abutting on them. The advantages derived by the property from the sewer would certainly have been lessened if surface water had been left undisposed of in the adjacent streets.*

We submit, therefore, that the sewer tax in question may be defended under the sovereignty of the State in the exercise of its police powers, and therefore be upheld without regard to the question of special benefit and without regard to the present controversy as to the extent of the ruling in Norwood *v.* Baker, and, moreover, that inasmuch as the sewer giving rise to the assessment in question was constructed only for the drainage of the district assessed, afforded drainage to every lot in that district, and therefore benefited each lot in proportion to its area, the language of the majority opinion in Norwood *v.* Baker, condemning an "exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him," whatever may be its proper effect, may be said as matter of law to have no application.

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* To demonstrate the insignificance of this claim, we further submit the following: Even if the drainage of the streets were to be considered, no substantial deduction could be made on account of it. Only surface water is drained from streets, but both sewage proper and surface water from private property. Yet, if streets and private property derived the same advantages in every respect from the sewer, the deduction could not exceed the ratio of the area of the streets to the area of the district. That would be small, and it would, moreover, be offset by the outlay made by the city for the drainage of the district by payment of the cost of the construction of public sewers, and of the maintenance of both public and district sewers, to which reference has been made in our foregoing statement of facts.

II.

We now come to the question of the effect of *Norwood v. Baker*.

That question has been before a number of courts. In *Hutcheson v. Storrie*, 92 Tex., 685; *Adams v. Shelbyville*, 154 Ind., 467, and in a number of decisions rendered by United States circuit courts, *Norwood v. Baker* has been declared to hold that local assessments for street improvements could not exceed the special benefits derived by the property assessed, and could not be made without notice to the landowner and an opportunity to be heard in relation to the extent of those benefits; and such the plaintiffs in error now contend is its effect.

On the other hand, in North Dakota, in *Webster v. City of Fargo*, 82 N. W. Rep., 732; in New York, in *Coude v. City of Schenectady*, 58 N. E. Rep., 130; in Michigan, in *Cass Farm Co. v. City of Detroit*, 83 N. W. Rep., 108, in Missouri, in this cause, and more fully in *Barber Asphalt Co. v. French*, 58 S. W. Rep., 934, and in Massachusetts in *Sears v. Boston*, 173 Mass., 71, the opinion of this court in *Norwood v. Baker* has been held to be based upon and have relation only to the peculiar features of the case, and not to reflect upon the validity of the frontage rule of assessment under ordinary circumstances, nor to limit the power of the legislature to apportion local assessments by any rule productive, upon the whole, of approximate equality.*

This conflict in the authorities at once suggests the proba-

* We understand that a like ruling was recently made by the supreme court of Pennsylvania in *Harrisburg v. McPherran*, which has not yet been reported.

bility that the majority opinion of this court in *Norwood v. Baker* contains expressions which appear to support either of the constructions thus given to it. Indeed, this seems to be conceded by the courts before which its effect has come into question.

Under these circumstances, before entering into any discussion of the conflicting views taken of that case, we deem it advisable to first consider in a cursory way the state of judicial opinions and adjudications at the time when the case was decided, and also the prior rulings of this court in relation to its subject-matter. Indeed, it would, in any case involving the scope of the matter now under discussion, be difficult to arrive at any satisfactory conclusion in any other manner.

The state of the law in regard to the constitutionality of local assessments was, in its general application, very clear at the time of the decision by this court of *Norwood v. Baker*. In some of the States such assessments had been declared invalid on account of peculiar constitutional provisions with which we are not now concerned. This was the case in Arkansas and in Tennessee, and at one time in Alabama, Colorado, Illinois, and Minnesota, though the rule in Alabama and Colorado was subsequently changed by judicial declaration, and in Illinois and Minnesota was subsequently altered in consequence of constitutional amendments (see notes on pages 505 and 506 of volume 25 of the American and English Encyclopædia of Law, "Taxation"). In two States, South Carolina and New Jersey, local assessments pursuant to arbitrary rules prescribed by legislature were declared invalid on the very ground which is invoked to defeat the assessments in litigation in the cases at bar, namely, that it was beyond the power of the legislature to

apportion those assessments according to any fixed rule, but that the assessment must, with respect to each lot, correspond with the special benefits actually derived and be based upon an ascertainment of such special benefits upon hearing and notice in some form. Wherever the frontage rule of assessment has come into question in other States its validity has been sustained. We will not undertake to cite authorities from all the States in which this has been done, but content ourselves with mention of the following:

Speer *v.* Mayor of Athens, 85 Ga., 49.
City of Fort Wayne *v.* Cody, 43 Ind., 197.
Meggett *v.* Eau Claire, 81 Wis., 326.
White *v.* People, 94 Ill., 604.
Rolph *v.* City of Fargo, 7 N. D., 640.
English *v.* Williams, 2 Marv. (Del.), 63.
Northern Ind. R. R. Co. *v.* Connelly, 10 U. S., 159.
Cleveland *v.* Tripp, 13 R. I., 50.
Whiting *v.* Townsend, 57 Cal., 519.
Daily *v.* Swope, 47 Miss., 367.
Parker *v.* Challis, 9 Kas., 155.
State *v.* Reis, 38 Minn., 371.
Preston *v.* Reid, 84 Ky., 154, 155.
Davis *v.* Lynchburg, 84 Va., 870, 871.
City of Parkersburg *v.* Tavenner, 42 W. Va., 489.
Allen *v.* Drew, 44 Vt., 174.
City of Kalamazoo *v.* Francoise, 115 Mich., 554.
Moberly *v.* Hogan, 131 Mo., 19.
People *v.* Brooklyn, 4 N. Y., 419.
Spencer *v.* Merchant, 100 N. Y., 585.
City of McKeesport *v.* Busch, 166 Pa. St., 46.
Warren *v.* Henley, 31 Iowa, 31.

This condition of the authorities supports the following remark, which will be found in Elliott on Roads and Streets, page 393:

"The weight of authority, however, is *overwhelmingly* in favor of the right of the legislature to determine what property shall be assessed and how the apportionment shall be made."

All the authorities upholding the power of the legislature to assess the cost of street improvements upon abutting property according to frontage recognize that the power of assessment can only be predicated on the existence of special benefits to the property assessed, and, with this as the acknowledged basis of taxation, they proceed upon either one or both of these theories, namely:

(1.) That, inasmuch as the assessment is a phase of taxation, it is a legislative function; that, by making it, the legislature determines the existence of the benefits; and that such determination is conclusive.

(2.) That no method of apportionment can be devised which, in its practical operation, will be productive of fairer results than that resulting from the method of apportionment according to frontage or area.

We now turn to the adjudications of this court in order to ascertain its rulings upon the subject.

Various cases which involved the constitutionality of the species of taxation under discussion were brought to the Supreme Court of the United States before that of *Norwood v. Baker* came before it. It will not be necessary to consider them all, since they are all uniform in their maintenance of

the validity of the legislation involved; the most important of them, those in which there exists the greatest similarity with the case at bar, will do.

One of the earliest of these is *Willard v. Presbury*, 81 U. S. (14 Wall.), 676, wherein it was held:

"Congress has power to confer on the city of Washington authority *to assess upon the adjacent proprietors of lots* the expense of repairing streets with a new and different pavement, or of repairing an old pavement."

This was followed by a number of decisions, among which was *Spencer v. Merchant*, 125 U. S., 345. This case involved the power of the legislature of New York to impose the cost of the improvement of a street on abutting property. The validity of the tax was attacked both in the court of appeals of New York, from which the appeal was taken, and in this court on the same constitutional grounds as are now invoked in the case at bar. In disposing of this attack, this court quoted the following from the decision of the State court with strong approval:

"By the act of 1891, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, *and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, it is not open to our review.* The question of special benefit, and the property to which it extends, is of necessity a question of fact, and when the legis-

lature determines it in a case within its general power its decision must, of course, be final."

Speaking for itself, this court says in the same opinion:

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. *But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not,* but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

In *Walston v. Nevin*, 128 U. S., 578, the question again came before this court. In that case the validity of a statute of Kentucky was in question. That statute provided for the improvement of streets, alleys, sidewalks, etc., and directed that:

"Such improvements shall be made *at the exclusive costs of the owners of lots* in each fourth of a square, to be equally apportioned by the general council *according to the number of square feet owned by them respectively*, except that corner lots (say thirty feet front and extending back as may be prescribed by ordinance) shall pay 25 per cent. more than others for such improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square."

This statute was upheld as being entirely consistent with the provisions of the amendments to the Federal Constitution, the court saying:

"*So the determination of the taxing district and the manner of the apportionment* are all within the legislative power (citing decisions), and whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied."

In *Parsons v. District of Columbia*, 170 U. S., 45, a question similar in principle was involved, the only difference being that therein a local assessment was made for the cost of water mains and at a fixed rate per front foot against all abutting property. The decision of the court may be best stated in the language of one of the *syllabi*, which is as follows:

"The enactment by Congress that assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear front foot, against all lots or land abutting upon the street, road or alley in which a water main shall be laid, *is conclusive alike of the necessity of the work and of its benefit as against abutting property.*"

We submit that, in this state of its own decisions and of the authorities elsewhere, it is not to be supposed that this court would overturn the law thereby established *without an explicit and unequivocal expression of its purpose.* That this is lacking must be conceded.

On the contrary, the majority opinion of this court cites and quotes from its own prior decisions, maintaining the conclusiveness and validity of fixed legislative assessments, and expressly declares: "It has been suggested that what

has been said by us is not consistent with our decision in Parsons *v.* District of Columbia, 170 U. S., 45, 52, 56. But this is an error." We submit, by way of comment, that so long as the Parsons case is treated as a correct exposition of the law, the system of taxation under discussion is safe from attack on the constitutional ground now invoked against it.

And, in this connection, it is further to be remarked that of all the jurisdictions whose decisions were cited in the majority opinion the State of New Jersey alone denied the power of the legislature to apportion local assessments.

The Norwood case really turns upon the exceptional features presented by it, and is not at all of the wide application which is being claimed for it. The case establishes only the invalidity of the particular law for local assessments which came under consideration in it. Under that law a street in the village of Norwood was extended for the space of three hundred feet through the property of one Baker, and, though an allowance of $2,000 was made as damages for the strip of land taken, the whole thereof, together with costs amounting to $218.58, were reassessed as benefits upon the land from which the strip was taken, without any proof or finding as to the extent of the benefits. For all this the law provided. With one breath it gave compensation for the strip taken; with another it provided that the adjacent property, and consequently that from which the strip was taken, should be assessed for the entire amount of the damages and of the costs, thus completely vitiating the allowance for damages, and making the land-owner part with his property and pay the costs of the proceeding in addition.

That this is what this court deemed the vital matter of

the controversy, and which it condemned, appears from the following extract from the majority opinion:

"It will not escape observation that, if the entire costs incurred by the municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property."

It is apparent that the validity of a law which provides for such a result, and of a proceeding which accomplishes it, cannot determine the validity of a law which imposes the cost of a street pavement or sidewalk upon abutting property in proportion to the frontage, or which charges the cost of a sewer upon the property drained in proportion to the area.

Much is made of the fact that the *Norwood case* asserts with great vigor that the right of local assessment is based on the theory of special benefit to the property assessed, and that every such assessment is invalid in so far as it substantially exceeds that benefit.

But there is nothing new or startling in this declaration, nor is it hostile to the manner of the apportionment of the costs of local improvements with which we are concerned.

All the jurisdictions which sustain that manner of apportionment are in accord with it.

It is one thing to say that the legislative action is based and maintained upon the theory that the property assessed derives special benefit to the extent of the tax, and another to say that the existence of the special benefit as determined by the legislature is always open to question—indeed, that an opportunity to question it must be afforded. In what other field of legislative discretion may this be claimed; in the exercise of what other function must the legislature in every case submit the correctness of its action to inquiry?

Local assessments can be justified only on the theory that they are based on special benefits; but some one must determine whether and to what extent those benefits exist. This inquiry *is not judicial*, as in the case of the exercise of the right of eminent domain, *but is legislative*, and the conclusiveness of the legislative determination necessarily follows, subject only to judicial interference when there is a palpable perversion of the power. All this is implied in the declaration which is to be found in *Norwood v. Baker*, and the mass of other decisions on the subject, that the assessment is a form of the power of taxation. Yet, may we ask, in what respects does the assessment partake of the essential characteristics of taxation or, lack those of eminent domain, if its amount is not to be fixed by the legislature, but must be ascertained in every instance as matter of fact on notice and hearing?

We maintain that the majority opinion in *Norwood v. Baker* does not seek to overthrow the legislative discretion in these matters, or the conclusiveness, in general, of the action of the legislature, but merely to hold that the power is not so unlimited that an abuse of it may not be checked.

This is to be gathered from the following extracts from that opinion:

"And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. * * * Neither can it be doubted that, if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement."

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property."

And the following remarks, made in the majority opinion in connection with a quotation from Dillon on Municipal Corporations, point to the same conclusion:

"While recognizing the fact that some courts have asserted that the authority of the legislature in this regard is quite without limits, the author observes that the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power *is not unlimited*, and these assessments must be apportioned *by some rule capable of producing reasonable equality*, and that provisions of such a nature as to make it *legally impossible* that the burden can be apportioned with proximate equality are arbitrary exactions, and not an exercise of legislative authority."

If our foregoing analysis of the Norwood case is correct, it merely holds that, under the facts presented in it, there was

a gross inequality of taxation, a virtual confiscation of property, and a consequent abuse by the legislature of its constitutional powers.

If we give the case that effect, we can clearly understand the foregoing declarations of the majority opinion that the legislature may determine "what property shall be considered as benefited," but that its discretion may not be so exercised as to make an apportionment with approximate equality "legally impossible"—declarations which are utterly irreconcilable with the contentions of the plaintiffs in error, since those contentions deny to the legislature any power of apportionment whatever, and require an assessment of every special benefit upon notice and hearing.

If we give the case that effect, it accords with the general current of the authorities which uphold the power of the legislature to apportion local assessments, and more especially those of them which are cited in the majority opinion, in one of which (Allen *v.* Drew, 44 Vt., 187, 188) we find the following exposition of the law:

"The power of taxation implies apportionment, and when the legislature have exercised the right and made the apportionment, a court should not declare it void, unless the invasion of private right was flagrant and its demonstration clear. * * * We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name."

And if we give it this effect, we make it accord with the ruling in another case, argued, submitted and considered, at

practically the same time, and involving a kindred question, namely, the consistency of certain municipal taxation with the fourteenth amendment to the Federal Constitution. We refer to the case of *Henderson Bridge Co. v. Henderson City*, 173 U. S., 614–616, wherein this court said (through Mr. Justice Harlan, who also delivered the majority opinion in the Norwood case).

"It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property without just compensation.

"But in order to bring taxation imposed by a State, or under its authority, within the scope of the fourteenth amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private right as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax."

A contrary view would do violence to the rule of *stare decisis*, to which this court has shown constant adherence, and would annul innumerable contracts, of vast aggregate amount, which were entered into and executed in reliance upon a state of the law, existing for many years and repeatedly declared by the courts to be fixed and settled beyond controversy.

And to what good? That property benefited by the work done under those contracts might escape liability, and this, though the owners had stood by in silence and permitted the work to proceed without objection?

Would any practical improvement occur over the past method of assessments? Of the many authorities which have approved legislative assessments by fixed rule, a con-

siderable number have declared that course of procedure to be conducive to better results than any other, and some have suggested that an ascertainment of benefits by commissioners might be accompanied by favoritism and even corruption. But, irrespective of the latter suggestion, the fact remains that, if an assessment is to be made for each local improvement by a proceeding judicial in nature, the same lot, instead of being chargeable merely for the street pavement in front of it, may be held chargeable in some degree for a remote improvement of the abutting street, or for the improvement of some neighboring street, and in the end there may be several notices, and several inquiries the mere expense of which to the land-owner, without including any assessment, would exceed the assessment under the frontage rule. Indeed, we note that in the State of New Jersey, in which the validity of an assessment *by the legislature* according to frontage is denied, assessment according to frontage *by commissioners* has been upheld (*Raymond v. Rutherford*, 55 N. J. L., 448), a condition which suggests that a change in the method of assessment from that by the legislature to that by commissioners may still leave the frontage rule in practice, and produce only a difference in attendant expenses.

III.

So much has been said in some cases with reference to the necessity of notice to the land-owner in the case of local improvements that we desire to devote a short space to the subject.

Whenever the rights of a citizen are to be determined by a judicial trial or hearing, he is entitled to notice,

and this right, therefore, exists when local assessments are to be determined by commissioners; but he is not entitled to notice when there is no hearing, and there is none when a local assessment is made pursuant to legislative prescription according to frontage or area. This distinction has been clearly announced by this court in *Hagar v. Reclamation District*, 111 U. S., 701; *Parsons v. District of Columbia*, 170 U. S., 54; *Williams v. Eggleston*, 170 U. S., 311, and other cases cited in these authorities, and it conforms to reason. "In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by hearing the tax-payer" (*Parsons v. District of Columbia*, 170 U. S., 55). And says Mr. Justice Brewer, in *Gillette v. Denver*, 21 Fed. Rep., 822, a case of sewer assessment almost, if not precisely, identical with that now before the court: "Now, in this case the tax is levied by area, no question of value; no matter of judgment; a mere mathematical calculation, and of what earthly benefit could it be for a tax-payer to have notice of that calculation? He can make it for himself."

However, irrespective of this rule, a sufficient hearing and notice are provided for. Under sections 22 to 26 of article VI of the charter of St. Louis (a copy of which will be found in the appendix of this brief, since they are not all set forth in the brief for the plaintiffs in error, as we expected them to be), a special-tax bill is issued for the sewer assessment

against each lot, and this tax bill can only be enforced by suit against the owner of the lot. In this suit the owner may naturally set up any defense which affects the validity of the tax bill. Indeed, the present proceedings, with the claim of the unconstitutionality of the tax bill, are in such a suit.

This being so, all purposes of the implied constitutional provision for notice and hearing are satisfied, it being sufficient if notice and hearing as to the validity of the tax are provided for at some stage of the proceeding.

Davidson *v.* New Orleans, 96 U. S., 97.
Hagar *v.* Reclamation District, 111 U. S., 701.
City of St. Louis *v.* Richeson, 76 Mo., 470.
Saxton National Bank *v.* Carswell, 126 Mo., 436.

Respectfully submitted.

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APPENDIX.

THE PROVISIONS OF THE ST. LOUIS CHARTER.

"SEC. 20. A sewer system is hereby established, which shall be divided into three classes, viz: 'public,' 'district' and 'private' sewers.

"SEC. 21. Public sewers shall be established and constructed along the principal courses of drainage, at such times, to such extent, of such dimensions and material, and under such regulations as may be provided by ordinance, to be approved by the board of public improvements, and there may be constructed such branches to sewers already constructed, or to be constructed, as may be considered expedient by said board: *Provided*, That no sewer shall be run diagonally through private property when it is practicable to construct it parallel with lines of such property, nor shall any public sewer be constructed through private property when it is practicable to construct it along a street, alley or public highway. An appropriation shall be made to meet the cost of such public sewer from the public revenue.

"SEC. 22. Board to approve district sewer improvements—Authority of assembly in reference to same—Special taxes for district sewers—Repairs to be paid by city.—District sewers shall be established within the limits of districts, to be prescribed by ordinance as approved by the board of public improvements, and so as to connect with a public sewer, or some natural course of drainage. Such district may be subdivided, enlarged or changed, upon the recommendation of said board, by ordinance, at any time previous to the construction of the sewer therein. The assembly shall cause sewers to be constructed in any district whenever a majority of the property-holders resident therein shall petition therefor, or whenever

the board of public improvements shall recommend it as necessary for sanitary or other purposes; and the character, dimension and material of such sewer shall be prescribed and may be changed, diminished, enlarged or extended, and such sewer shall possess all requisite laterals, inlets and other appurtenances. As soon as a district sewer, with its inlets, manholes and other appurtenances is fully completed, the said board shall cause to be computed the whole cost thereof, and shall assess it as a special tax against all the lots of ground in this district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway; and the board shall cause to be made out a certified bill of such assessment against each lot in the district, in the name of the owner thereof, which shall be collected and paid in the manner hereinafter prescribed: *Provided*, That the repairs and other incidental expenses of district sewers shall be paid out of the general revenue."

SEC. 23. (This section relates wholly to private sewers, and is, therefore, omitted.)

"SEC. 24. Special-tax bills—How made out.—All special-tax bills for work contemplated by this charter shall be made out by the president of said board, and by him registered in his office in full, and certified and delivered to the comptroller, and his receipt taken therefor, and by him registered and countersigned and delivered to the party in whose favor it is issued for collection, and his receipt taken in full of all claims against the city on account of said work.

"SEC. 25. Special-tax bills to be a lien on property—Manner of collecting same—City not to be liable for special-tax bills, etc.—Said tax bill shall be and become a lien on the property charged therewith, and may be collected of the owner of the land, in the name of and by the contractor, as any other claim in any court of competent jurisdiction, with interest at the rate of ten per cent. per annum, after thirty days from

demand of its payment date; and if not paid within six months after such demand, then at the rate of fifteen per cent. per annum from the date of said demand. In case the owner of the ground is a non-resident of the State, suit may be brought by attachment, which shall be a demand of its payment. Such certified bill shall in all cases be *prima facie* evidence that the work and material charged in such bill shall have been furnished, and of the execution of the work, and of the correctness of the rates or prices, amount thereof, and of the ability of the person therein named as the owner of the land charged with such bill to pay the same: *Provided*, That nothing in this section shall be so construed as to prevent the party charged with the payment of said bill from pleading, in reduction of the amount of same, that the work therein mentioned was not done in a good and workmanlike manner; and provided that if the party charged shall set up, by way of defense, that the work was not done in a workmanlike manner, according to the class of work mentioned in the contract, and that such party before the commencement of the suit, tendered to the contractor the full value of such work as done, and shall establish the same on the trial, the recovery shall only be for the amount so tendered, and judgment for costs shall be rendered against the plaintiff. The city shall not be liable, in any manner whatever, for or on account of any work done which is to be paid for in the manner provided in this section.

"SEC. 26. Whenever any such special-tax bill issued heretofore, or hereafter to be issued, shall be paid, it shall be entered 'satisfied' on the register in the comptroller's office; and any bill that is not entered 'satisfied' within two years after its date, unless proceedings in law shall have been commenced to collect the same within that time, and shall still be pending, the lien shall be destroyed and of no effect against the land charged therewith."

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